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No. 848

In the Supreme Court of the United States

OCTOBER TERM, 1960

DEWEY BOB HELM, BERT FLATT, CARL M. FOX,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (R. 46-47) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered February 25, 1961. The petition for a writ of certiorari was filed on March 25, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the indictment sufficiently charged the offense of selling distilled spirits without proper tax stamps, under 26 U.S.C. 5604(a)(1).

2. Whether the stamp requirements of 26 U.S.C. 5205(a)(2) applied to the illegally produced whiskey the petitioners possessed.

STATUTES INVOLVED

Section 5604(a)(1) of the Excise Tax Technical Changes Act of 1958, 72 Stat. 1401 (26 U.S.C. 5604(a)(1)) provides in pertinent part:

> PENALTIES RELATING TO STAMPS, MARKS, BRANDS, AND CONTAINERS.
>
> "(a) General.—Any person who shall—
>
> "(1) transport, possess, buy, sell, or transfer any distilled spirits, required to be stamped under the provisions of section 5205(a)(2), unless the immediate container thereof has affixed thereto a stamp as required by such section; or
>
> * * * *
>
> shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, for each such offense.
>
> * * * *

Section 5205(a)(2) of the Excise Tax Technical Changes Act of 1958, 72 Stat. 1358 (26 U.S.C. 5205(a)(2), formerly 26 U.S.C. 5008(b)(1)) provides in pertinent part:

> Containers of other distilled spirits.—No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate

> container thereof is stamped by a stamp evidencing the determination of the tax or indicating compliance with the provisions of this chapter. * * *

Section 2803(a) of the Internal Revenue Code of 1939, 53 Stat. 303 (then 26 U.S.C. 2803(a)), repealed effective January 1, 1955, provided:

> Requirement.—No person shall transport, possess, buy, sell, or transfer any distilled spirits, unless the immediate container thereof has affixed thereto a stamp denoting the quantity of distilled spirits contained therein and evidencing payment of all internal-revenue taxes imposed on such spirits. * * *

STATEMENT

The petitioners were indicted in the Middle District of Tennessee for offenses involving the violation of revenue acts applicable to distilled spirits. Indictment No. 3015 charged petitioners Bert Flatt and Carl M. Fox in one count, and indictment No. 3019 charged Dewey Bob Helm in two counts[1] under the provisions of 26 U.S.C. 5205(a)(2) and 5604(a)(1) with having (R. 3, 33-34):

> unlawfully transported, possessed and transferred a quantity of distilled spirits . . . the immediate containers thereof not having affixed thereto in the manner required by law, stamps

[1] Count I involved 18 gallons of whiskey on August 5, 1959 and Count II involved 6 gallons of whiskey on August 11, 1959.

> evidencing payment of all internal revenue taxes imposed on such spirits.

Indictment No. 3016 charged all the petitioners with a conspiracy under 18 U.S.C. 371 in having (R. 15):

> unlawfully, wilfully and knowingly combined, conspired, confederated and agreed together . . . to violate Title 26, Section 5604(a)(1), United States Code.

This indictment then described the conspiracy and listed 10 overt acts (R. 15-18).

On May 3, 1960, the petitioners pleaded not guilty to all the indictments (R. 4, 19, 35). The indictments were consolidated for trial and the petitioners were convicted on all counts (R. 2, 13-14, 32). The petitioners' motions for judgment of acquittal for failure of proof and on the ground that the statute did not require stamps "for moonshine whiskey" (R. 43) were overruled (R. 40-41).

Petitioner Dewey Bob Helm, was sentenced to 3 years imprisonment on the conspiracy indictment, No. 3016 (R. 23), and 3 years on each count of indictment No. 3019, to run concurrently with each other and concurrently with the sentence for conspiracy (R. 36). Petitioner Bert Flatt was sentenced to 2 years imprisonment on the conspiracy indictment No. 3016 (R. 27) and 2 years on indictment No. 3015, to run concurrently with the sentence on the conspiracy indictment (R. 6-7). Petitioner Carl M. Fox was sentenced to 15 months imprisonment on the conspiracy indictment (No. 3016) (R. 25), and

15 months on indictment No. 3015 to run concurrently with the conspiracy sentence (R. 8).

On appeal, the judgments were affirmed. The Court of Appeals held that the indictments were sufficient and that the other questions were without merit (R. 46-47).

ARGUMENT

1. The petitioners attack the validity of the pleading of the substantive counts because the language of the allegations is drawn from repealed Section 2803 (a) of the Internal Revenue Code of 1939, rather than from the language of 26 U.S.C. 5205(a)(2). That question need not be reached in this case because the conspiracy count had no such technical infirmity. It is well established that because agreement is the essence of a conspiracy, a conspiracy count need not allege the violation of law with the same precision as would be necessary for the substantive count. *Wong Tai* v. *United States*, 273 U.S. 77, 80-82; *Burroughs and Cannon* v. *United States*, 290 U.S. 534, 542-544; *Davis* v. *United States*, 253 F.2d 24 (C.A. 6).

This Court in a long line of decisions has ruled that it will not review the correctness of each count of multiple convictions when there is a valid count to support the sentence. *Claassen* v. *United States*, 142 U.S. 140, 146; *Pierce* v. *United States*, 252 U.S. 239, 252; *Brooks* v. *United States*, 267 U.S. 432; *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Pinkerton* v. *United States*, 328 U.S. 640, 642, fn. 1;

United States v. *Sheridan*, 329 U.S. 379, 381; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *Lawn* v. *United States*, 355 U.S. 339, 359. This is in conformity with the well-established judicial policy of not deciding issues which can have no material effect on the rights or status of the litigants. Consequently, the case at bar is not an appropriate vehicle to resolve the conflict of decisions[1] as to the technical aspects of pleading the substantive offenses.

2. In any event these indictments were adequate. The fact that the indictment charged that the immediate containers did not have affixed thereto, in the manner required by law, "stamps evidencing payment of all internal revenue taxes" rather than "stamps evidencing the determination of the tax or indicating compliance with the provisions of this chapter" (26 U.S.C. 5205(a)(2), *supra*) was not fatal. These indictments unmistakably indicated that one element of the offense was the lack of the required tax stamps. It is inconceivable that these petitioners could possibly have been misled by the incorrect description of the legal purpose of the stamps. This is not a prosecution of a distiller for failure to have the proper "type" of strip stamp, but (as the petitioners point out in a different connection) this was a prosecution of "moonshiners," involving the total absence of any stamp at all. In fact the petitioners agreed at the trial that an offense was charged (Tr. 318).[2] Under these circumstances the present attack

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[1] *Smith* v. *United States*, 241 F.2d 267 (C.A. 5) and *United States* v. *Smith*, 232 F.2d 570 (C.A. 3).

[2] A copy of the transcript is being lodged with the Clerk.

on the indictment comes too late. The test is not whether the indictment could have been made more certain, but whether the indictment sufficiently apprised the accused of the elements of the offense and what he must be prepared to meet, and whether the record would suffice to plead a former acquittal or conviction. *Burton* v. *United States*, 202 U.S. 344, 372-373; *Hagner* v. *United States*, 285 U.S. 427, 430-432.

3. The petitioners' claim that they may not be convicted of unlawful possession of distilled spirits, for which they could not obtain the required strip stamps, is frivolous. The petitioners' failure to qualify under the regulations as proprietors of a legitimate bottling house, and the consequent inability to obtain the required strip stamps, does not permit them to sell distilled spirits without paying any tax. The regulations controlling distilled spirits are necessary effectively to collect the taxes imposed. Inability to comply, because of having an unlicensed distillery, or selling "moonshine" whiskey, does not excuse a violation of the statute. Distilled spirits, even when produced illicitly, are taxable. See *Johnson* v. *United States*, 276 F.2d 84, 86 (C.A. 4).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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